

Capital Case Oversight Committee

State Courts Building, Phoenix

Meeting Minutes: August 17, 2018

Members attending: Hon. Ronald Reinstein (Chair), Hon. Kent Cattani, Lacey Gard, Donna Hallam, Hon. Kellie Johnson (by telephone), Michele Lawson, Dan Levey, Marty Lieberman by his proxy Jennifer Garcia, William Montgomery by his proxy Jon Eliason, Hon. Sam Myers, Daniel Patterson, Christina Phillis, David Rodriguez, Natman Schaye

Guests: Rosemarie Peña Lynch, Ellie Hoecker, Charlotte Merrill, Carolyn Edlund, John P. Todd, Rebecca Huerta, Jana Sutton, Hon. Paul McMurdie, Jon Canby, Jeff Kirchler, Michael Kiefer, Chris Bleuenstein, Madeline Mayer, Tim Geiger

Staff: Mark Meltzer, Theresa Barrett, Angela Pennington

1. Call to order, introductory remarks, and approval of meeting minutes: The Chair called the meeting to order at 12:03 p.m., followed by introduction of members, proxies, and guests. The Chair then directed members to draft minutes of the November 1, 2017 meeting that were included in the meeting materials packet. Judge Cattani noted that a reference at page 2 of the draft to Rule 32.1(8) should instead be to Rule 32.1(h).

Motion: With the change noted above, a member moved to approve those minutes. Another member made a second, and the motion passed unanimously.

2. Status reports: The Chair then asked members for status reports.

Judge Myers reported that Maricopa County, which had 56 capital cases pending resolution when the Oversight Committee met in November, now has 47 pending cases. There are a couple cases involving restoration to competency, and the County Attorney has recently filed two death notices that are not yet reflected in his data. There were 20 capital case petitions for post-conviction relief in the pleading stage in November; now there are 17 cases. In addition, seven PCRs have been fully briefed and are pending judicial action. He announced the pending retirement of Carolyn Edlund, who has been a resource on capital cases for judges statewide. Mr. Eliason concurred with Judge Myers' numbers. The Maricopa County Attorney has filed six new death notices this year, and it received one additional capital case on remand. Four capital cases have gone to trial so far this year; two juries returned with death verdicts, one hung in the penalty phase, and there was one mistrial. Three cases previously remanded for resentencing have been resolved. Including cases now pending sentencing, the County Attorney has dropped the death notice in six cases. Ms. Phillis advised that the Office of Public Defense Services has staffed 54 active capital cases, which includes cases pending sentencing or

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competence determinations. Her office has also staffed 15 first degree murder cases in which there is a potential for a death notice. She concurred with Judge Myers on the number of pending capital PCRs.

Mr. Rodriguez stated that there are 8 pending capital cases in Pinal County, the same number as his November 2017 report. His office dropped the notice in two pending cases and filed a notice in two other cases. Mr. Mosher sent an email advising that there are no pending capital cases in Pima County, although the County Attorney is reviewing a couple cases where a notice is possible. Mr. Schaye noted that the Santa Cruz County Attorney has a case where it is considering a death notice. The Chair added that Yuma County has no pending capital cases, and that Yavapai County has two. Mohave County dropped a death notice in two cases and might not file notices in future cases because of the associated cost and time to resolution.

Ms. Gard reported 12 capital cases on direct appeal, two of which were *McKinney* remands from the Ninth Circuit. There is a pending petition for certiorari in another case. Her number of pending capital PCRs in Maricopa County, 24 cases, is the same as reported by Judge Myers. She also has two pending capital PCRs in Mohave County and one in Pima County. She has petitions for review pending in the Supreme Court in 11 first PCRs, seven from Maricopa County and four from Pima. In the federal district court, she has 35 cases: 23 on initial habeas petitions, and others involving remands under *Martinez* and *McKinney*. She has 16 pending capital cases in the Ninth Circuit and two in the U.S. Supreme Court. Appeals have been completed this year in ten cases and two more will probably be completed by year's end. Ms. Hallam's number of 12 pending direct appeals in the Arizona Supreme Court is consistent with Ms. Gard's. A pending motion in an older Mohave County case (*State v Poyson*, Supreme Court No. CR-98-0510) is requesting a new independent review of the death sentences. Ms. Hallam reported that the Arizona Supreme Court has 15 pending petitions for review in capital cases, which includes a few successive petitions.

3. Update on the Task Force on Rule 32 of the Arizona Rules of Criminal Procedure. Earlier this year, by entry of Administrative Order No. 2018-07, the Supreme Court established a task force to review and propose substantive changes to Criminal Rule 32: "post-conviction relief." Six Oversight Committee members were appointed to serve on the Rule 32 Task Force. Three of those members — Judge Cattani, Judge Johnson, and Ms. Gard — presented issues the Rule 32 Task Force is addressing that affect capital cases.

One issue involves the appointment of a defense team, including co-counsel and a mitigation specialist, in a capital PCR. The Task Force will recommend an amendment to Rule 32.4 that will allow the trial court to appoint a defense team on a showing of reasonable necessity, the same showing that is required for pre-trial appointments under

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Rule 6.7. Upon such a showing, the rule requires the appointment of co-counsel in a capital case, but appointment of other members of the defense team is discretionary. The proposed rule codifies current practices of the Superior Court in Maricopa and Pima Counties. The Task Force concluded that if the trial court appoints co-counsel in a capital case, that person does not need to be qualified under Rule 6.8 because co-counsel may have another skill set or special knowledge that would benefit the defense. Task Force members discussed compensation of appointed counsel in a capital case but did not believe the amount of compensation was a proper subject of a Rule 32 provision.

Ms. Gard presented an issue to the Task Force regarding Rule 32.1(h). The issue was prompted by the Arizona Supreme Court's recent opinion in *State v. Miles*. The current rule affords relief if the court determines that "no reasonable fact-finder" would have imposed the death penalty. Ms. Gard suggested that because mitigation evidence is subjective, Rule 32.1(h) is deficient because it lacks an objective standard. She proposed revisions to Rule 32.1(h) that would add an aggravation phase verdict to its scope but remove consideration of a death penalty verdict. She added that her revisions would still permit a defendant sentenced to death to seek relief under other sections of Rule 32.1, such as on grounds of newly discovered evidence or ineffective assistance of counsel. Ms. Merrill, who served as Ms. Garcia's proxy at a recent Task Force meeting, contended that the Task Force should clarify the standard for relief from a death penalty verdict under Rule 32.1(h), but it should not abrogate its substance. She added that there are only a handful of Rule 32 petitions that request relief under current Rule 32.1(h), and she does not expect the *Miles* opinion to open a floodgate of petitions seeking relief under that rule. Judge Cattani briefly noted a separation of powers issue that the Task Force had discussed; the other sections of Rule 32.1 have a statutory analog, but Rule 32.1(h) does not. He invited those present to provide their comments on Rule 32.1(h) to the Task Force before it considers this issue again at its August 31 meeting.

Judge Johnson noted that the Task Force was considering revisions to the "of right" language in Rule 32.1, and Ms. Gard advised that the Task Force had discussed, but had not concluded, its consideration of competence issues in a post-conviction proceeding.

4. Capital case juries. Included in the materials for today's meeting is an article Mr. Schaye recently submitted for publication in the *Arizona Attorney* titled "Revisiting the Power of Twelve: Fairness and Capital Juries." (See further a related discussion of this topic in the November 1, 2017 Oversight Committee meeting minutes, section 6.) The Chair invited Mr. Schaye to summarize his article. Mr. Schaye responded that a "power of twelve" study was done in Arizona about 25 years ago, which resulted in dozens of recommendations, some of them cutting-edge, for civil and criminal case juries.

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However, these innovations preceded *Ring* and jury sentencing in the penalty phase of a capital trial, and they have not recently been reviewed or revised.

Mr. Schaye emphasized that the penalty phase in a capital case is subjective in nature. Jurors are asked to make a personal, moral decision, which is neither objectively right or wrong. This implicates several aspects of capital case juries, including instructions that are often difficult to comprehend. He noted disparities in the selection process for capital case juries. And jurors often proceed through a capital case without an understanding of what is expected of them. Mr. Schaye submitted that these aspects are not well-studied or researched. He would like the Supreme Court to establish a committee with a goal of mitigating the subjectivity of the process. He would like to see lawyers, judges, social scientists, linguistic experts, and psychologists as members of that committee. Mr. Schaye requested the Oversight Committee's support for his proposal. The members' comments that followed included the following.

- Jury instructions in capital cases are constrained by statutory language and decades of court opinions parsing words and phrases.
- Instructions to capital case juries could probably be improved. But capital case jury selection is difficult to script, and different judges have different styles.
- Mr. Schaye has some recommendations that could result in rule changes, such as increasing the number of peremptory challenges and changing the timing of motions for new trial.
- There could be improved guidance concerning the selection of a capital case jury, including how to conduct the selection of jurors (in a large group, a small group, individually) and the length of time jury selection should take.
- Perhaps Arizona should return to judge sentencing in capital cases.
- We should first identify the specific problem being solved. If there are inconsistent practices in different courtrooms, is that a problem? Will a lack of flexibility create new problems?

5. Oversight Committee's 2018 recommendations to the Arizona Judicial Council. Administrative Order No. 2016-11, which extended the Oversight Committee's term to December 31, 2018, required the Committee to submit two reports to the Arizona Judicial Council. The first report, which was included in the meeting materials and that the Committee submitted in December 2017, contained no recommendations. The Chair solicited the members' recommendations for the 2018 report, which the Chair will present at the Council's December 2018 meeting.

Mr. Schaye then made a motion that the Arizona Supreme Court establish a committee to study jury issues in capital cases. The Chair observed that the Supreme Court might consider establishing such a committee even without review of this issue by the Council, i.e., without a formal recommendation in the Oversight Committee's 2018

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report to the Council, but members nonetheless proceed to discuss and vote on the motion.

Motion: To recommend that the Court establish a committee to study jury issues in capital cases. The motion received a second and passed unanimously.

Mr. Schaye said he would prepare a detailed written proposal for the members to review at the next Oversight Committee meeting.

The Chair proposed that the 2018 report include a recommendation to increase the rate of compensation for court-appointed counsel in capital PCRs, which is currently set by statute at \$100. He thought an increase to \$125 per hour would be inadequate to attract well-qualified counsel, and he recommended an increased hourly rate of \$150. The federal rate for court-appointed counsel is \$187 per hour. For first-chair counsel in Maricopa County, the rate is \$145 per hour. For capital case appeals in Maricopa County, and for capital cases in Pinal County, the rate is \$100 per hour. The Attorney General's office, among others, supports a higher amount than currently prescribed to encourage competent counsel to apply for appointments on capital cases. Members discussed but rejected a proposal to include a cost-of-living adjustment in the hourly rate. Members also discussed but declined to recommend an amendment to the statute to refer to compensation generically but without referring to a dollar amount. A member then made the following proposal by motion.

Motion: To recommend an amendment to the statute that would provide a floor for the hourly rate but not a cap, thereby allowing a county to pay more than the minimum hourly rate. After a second and discussion, the motion passed on a unanimous vote.

The Chair also proposed reversing the current structure of post-judgment appointments in capital cases. Under the current structure, the trial court appoints counsel for an appeal, and the Supreme Court appoints counsel to appear in the trial court for post-conviction proceedings. This rationale for the Chair's proposal is that the appellate court is more knowledgeable about the qualifications of attorneys on appeals, and the trial court correlatively so on attorneys who appear in that court. The applicable statute already allows the Supreme Court to delegate appointments on capital PCRs to the presiding trial court judges, but even in that circumstance, the statute seems to require the Court to retain a list of qualified capital PCR counsel. The Chair will research this further, and members will revisit the issue at their next meeting.

The Chair noted that when the Oversight Committee was established, there were about 140 pending capital cases in Maricopa County. Currently, there is a fraction of that number pending, and the Chair asked whether the 2018 report should recommend disbanding the Committee or extending its term. Members had different views. One

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member noted that the number of pending cases has decreased over the years, but not because of anything this Committee has done. The member said that because the number is lower, the Committee no longer needs to monitor a high volume of capital cases. Another member noted the usefulness of having this Committee continue to exist as a forum for discussing capital case issues that are of statewide concern. And a guest observed that although the number of capital cases in Maricopa County has declined considerably, it continues to be one of the top counties in the nation on per capita death penalty cases. Mr. Eliason responded that Maricopa County prosecutors have an excellent relationship with the defense bar, they invite the early submission of mitigation material, and they are working to further reduce the volume of capital cases. However, there are cases where a death penalty is appropriate, and their office will continue to file notices in those cases. Mr. Rodriguez noted that it still takes a long time to get a capital case to trial in Pinal County. The Chair tabled further discussion of this issue to the next Committee meeting. It's possible that the Committee's 2018 report won't make a recommendation on this topic and the Council will make its own determination about extending the Oversight Committee's term.

6. Call to the public; adjourn. There was no response to a call to the public. For the good of the order, Judge Cattani provided an update on his November 2017 presentation on hair microscopy. His update included information about law enforcement's effort to narrow the universe of cases involved in the study.

The Chair requested staff to follow up with members about establishing a date for a Committee meeting this fall. The meeting adjourned at 1:19 p.m.